



# Maryland

## Department of the Environment

Larry Hogan, Governor  
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary  
Horacio Tablada, Deputy Secretary

April 15, 2019

The Honorable Andrew Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

The Honorable R.D. James  
Assistant Secretary of the Army for Civil Works  
U.S. Army Corps of Engineers  
108 Army Pentagon  
Washington, DC 20310

Re: Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Assistant Secretary James:

As Secretary of the Maryland Department of the Environment (MDE), I have been asked by Governor Larry Hogan to provide comments on your proposal to revise the definition of Waters of the United States (Clean Water Rule: Definition of “Waters of the United States: Docket ID No. EPA-HQ-OW-2018-0149). MDE appreciates the opportunity to provide its perspective on the definition of waters which should be protected by the Clean Water Act (CWA). Maryland also appreciates the agencies’ efforts to work with states to create a clear, effective rule. Maryland continues to advocate for an extension to the comment period—or the reopening of the comment period for at least another 90 days—so that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) can conduct additional outreach to states and have additional dialogue with states before the publication of a final rule.

Maryland supports clarity in definitions, federal jurisdiction, review standards and procedures. Maryland understands the challenge you face in striking the right balance in ensuring the nation’s waters are kept free from pollution while promoting economic growth, agricultural productivity, minimizing regulatory uncertainty and increasing clarity and consistency. While CWA jurisdiction is a confusing and complex issue, we have nevertheless as a nation made great strides in protecting and restoring wetlands and waterways. This is in large part due to the efforts of states to put in place independent state-level regulatory frameworks, with the federal government providing an important regulatory backstop.



### **Upstream Wetland and Waterway Impacts on Downstream States**

Maryland has comprehensive state laws in place to protect and restore its wetlands and waterways. Maryland's primary interest is in ensuring that any changes in the definition of Waters of the United States (WOTUS) do not put at risk the progress we have made in Maryland to protect and restore our waters, particularly the Chesapeake Bay (the Bay). In our review of the proposed rule, Maryland has focused primarily on how the proposed changes to CWA jurisdiction could, if adopted by upstream states, affect water quality and flooding in Maryland. Maryland (or any other state) has an extremely limited ability under the CWA to compel an upstream state to protect an upstream wetland or waterway from filling or the addition of pollution if that wetland or waterway is no longer covered by the CWA. This is a fundamental reason why the federal definition of WOTUS is so important to Maryland. Indeed, any state with comprehensive and protective statutes and regulations protecting water quality in its waters should have concerns about the extent to which the federal regulatory backstop is sufficiently protective to prevent activities in upstream wetlands and waterways in one state from adversely impacting water quality and/or causing flooding in a downstream state. The conditions of downstream waters and all of the fish and wildlife resources associated with these waters are strongly influenced by the condition of upstream waters. Continued progress toward success in conservation efforts relies on sustained protection of upstream waters.

The health of the Bay has particular significance for Marylanders and the health of this estuary relies on reductions in excess nutrients and sediment reaching the estuary. Recent monitoring information indicates progress in reducing these pollutants to Bay. Maryland does not want to see its substantial investment in restoring the Chesapeake Bay undermined by the federal government no longer ensuring that upstream waters (with the potential to impact water quality downstream) are covered by CWA protections. Over \$5 billion has been invested by Maryland in Chesapeake Bay restoration since Governor Hogan took office and this investment should not be put at risk as a result of reduced federal jurisdiction.

Maryland undertook a preliminary analysis of the potential impacts of the proposed definition of WOTUS on meeting Bay Total Maximum Daily Load targets. For purposes of the analysis, Maryland assumed that the Feb. 14, 2019 proposed federal definition of regulated wetlands was implemented upstream of Maryland, in the Susquehanna River watershed. The preliminary analysis indicates that up to an additional 2.3 million pounds of nitrogen per year and up to an additional 57,000 pounds of phosphorus per year could enter the Chesapeake Bay should the new definition of jurisdictional wetlands be implemented upstream. The cost to Marylanders off-setting this additional pollution over 20 years could be over \$1 billion.

In addition, a preliminary analysis completed in the Maryland/Delaware interstate Nanticoke River watershed estimates that up to 36% of the Delaware wetlands providing flood attenuation and nutrient transformation functions would be unprotected under the proposed rule. If these wetlands are lost due to the lack of federal jurisdiction, Maryland would face increased demands for nutrient reduction for water quality, as well as potential increases in flooding in this watershed. Maryland seeks to ensure that the definition of federally regulated waters minimizes situations where activities impacting unregulated waters in an upstream state could adversely impact Maryland water resources, or, cause Marylanders to



suffer additional financial, health, or safety-related obligations as a result of upstream waters being unprotected.

Accordingly, Maryland recommends that the agencies consider including in the definition of WOTUS any wetland or waterway in an interstate Hydrologic Unit Code (HUC) 8 watershed that has the potential to impact water quality or flooding in a downstream state in that same HUC 8 watershed. A watershed-based approach to federal protection of wetlands and waters which have the potential to impact water quality or flooding in a downstream state would address Maryland's most significant issue with the proposed WOTUS definition.

### **Definition of Jurisdictional Wetlands**

Most wetlands in Maryland are supported in part or predominantly by groundwater. These groundwater-supported wetlands are essential to other traditional surface waters by contributing base flow to maintain relatively permanent, perennially or seasonally flowing waters; storing floodwaters; and providing natural water quality and habitat benefits. It is difficult to protect water quality in traditional navigable waters without regulating activities in wetlands which are hydrologically connected via groundwater to these surface waters.

The proposed WOTUS definition of protected wetlands only includes wetlands which abut or have a direct hydrologic surface connection to a traditionally navigable water in a typical year. A groundwater connection alone to a jurisdictional water is not, under the proposed rule, sufficient to establish jurisdiction. Maryland supports a broader definition of federally jurisdictional wetlands to include those wetlands with only groundwater connections but which are "bordering, neighboring, or contiguous" to other jurisdictional waters.

### **Jurisdictional Tributaries**

The majority of Maryland's streams are small. There are at least 8,800 miles of non-tidal streams and rivers in Maryland; the vast majority (about 91%) of the total stream miles in Maryland consist of small (first, second, or third Strahler order) streams - with most (5,863 miles or 66%) of the total consisting of first order (the smallest mapped) streams. Maryland's small streams support more than 50 native fish species, ten native freshwater mussels, eight native crayfishes, seven salamanders, and more than one hundred genera of benthic macroinvertebrates. Many of these species are included in the 2016 document "List of Rare, Threatened, and Endangered Animals of Maryland" ([dnr.maryland.gov/wildlife/Documents/rte\\_Animal\\_List.pdf](http://dnr.maryland.gov/wildlife/Documents/rte_Animal_List.pdf)). More than half of the Maryland records of Dwarf Wedgemussel, *Alasmodonta heterodon*, (a federally endangered species) are from small streams.

The proposed definition of WOTUS considers tributaries such as rivers and streams jurisdictional only if they contribute perennial or intermittent flow to a traditionally navigable water and the proposed rule specifically excludes ephemeral tributaries. Although ephemeral tributaries only carry water in response to precipitation they can serve valuable ecosystem services in the processing of a variety of water quality pollutants and in conveying water. Such ephemeral tributaries allow water to have a greater proportion of surface area contact with stream banks and stream bottoms, which in turn aids in

uptake and transformation of pollutants such as nutrients into adjacent vegetation and soil media. Excluding all such water courses from regulation may allow for increased filling of such tributaries thereby losing many of the pollutant removal benefits of their existence. In addition, these ephemeral tributaries can provide habitat for a variety of wildlife such as amphibians and reptiles that exploit their transitional habitat. Ephemeral tributaries also serve as preferential precipitation flow paths supporting species that are well-adapted to such conditions.

Because ephemeral waters can provide important ecosystem services and benefits, Maryland supports a broader definition of jurisdictional streams to include those ephemeral streams, which are demonstrated to provide important ecosystem services and benefits.

In summary, in order to continue to advance the protection and restoration of the nation's wetlands and waterways Maryland recommends that EPA and ACOE revise the proposed definition of WOTUS to include:

1. Any water or wetland in an interstate HUC 8 watershed that has the potential to impact water quality or flooding in a downstream state in that same HUC 8 watershed (i.e., any wetland or water in an interstate HUC 8 watershed that has a significant nexus to a downstream water in another state in that HUC 8 watershed).
2. Wetlands, including those wetlands with shallow groundwater connections, which border, are neighboring to, or contiguous to other jurisdictional waters.
3. Ephemeral streams that are demonstrated to provide important ecosystem services and benefits.

Maryland also encourages EPA and ACOE to support training, guidance and continued financial assistance to state programs to ensure a smooth transition as we implement any new definition of waters covered by the CWA.

Maryland appreciates the challenge you have before you, to strike the right balance in ensuring the nation's waters are protected from pollution, while promoting economic growth, agricultural productivity, minimizing regulatory uncertainty, increasing clarity and consistency, and showing due regard for the critical role of states as defined by Congress in the CWA.

Sincerely,



Ben Grumbles  
Secretary

Cc: Jeannie Haddaway-Riccio, Secretary, Maryland Department of Natural Resources  
Joe Bartenfelder, Secretary, Maryland Department of Agriculture

Attachment